Federal Court  Cour fédérale

Date: 20130618

Docket: IMM-7323-12

Citation: 2013 FC 674

Ottawa, Ontario, June 18, 2013

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

ALEX GHAFFARI
A.K.A. "AKBAR GHAFFARI"

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is the judicial review of a decision by an Immigration Officer [Officer] denying the Applicant a permanent resident visa on grounds of security because of his membership and engagement in an intelligence unit of the Iranian armed forces, the Iranian Sepah Padaram Islami [SPI]. He was inadmissible pursuant to *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], s 34(1) and (2).

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for

(a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;

(b) engaging in or instigating the subversion by force of any government;

(c) engaging in terrorism;

(d) being a danger to the security of Canada;

(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or

(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph *(a)*, *(b)* or *(c)*.

(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :

a) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;

b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;

c) se livrer au terrorisme;

d) constituer un danger pour la sécurité du Canada;

e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;

f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas *a)*, *b)* ou *c)*.

(2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

II. BACKGROUND

[2] The Applicant, a citizen of Iran, is married to a Canadian. He is currently living in the UK where he has protected person status as a result of persecution suffered in Iran. The narrative of his experiences are covered in much of the UK proceedings.

[3] While there is some dispute about dates, the Applicant claimed that he served in the armed forces starting in 1998 where he completed 1.5 months basic training before he was selected to specialize in intelligence work and completed 4.5 months further training.

[4] There is a dispute as to whether he was drafted into the armed forces or volunteered. The Applicant claims he was drafted and assigned to the intelligence section. He also claims that during training he was brainwashed to believe that what they were doing as soldiers was justified under the Koran and Islam.

[5] The Applicant was assigned to undercover work in the villages of Kurdistan to obtain intelligence and to identify persons who may become the subjects of torture and/or execution by the regime. He said that he disliked this type of work and tried to return with minimal useful information.

[6] The Applicant witnessed torture of two individuals but did not participate in it. He attested to the fact that he "did not leave the service at that time because I had any place to flee to". It is evident that this is a typographical error and that he was trying to say that he had nowhere to flee.

The Officer's Notes recount a different story but the Applicant's explanation is under oath and cannot be so easily rejected.

[7] In February 2000 the Applicant was ordered to assassinate an anti-government activist and senior member of the Democratic Party. It was at that point that he decided to escape, lied to his senior officer and made it to the Turkish border.

[8] He made his way to the UK where he secured protected person status. He subsequently learned that the assassination occurred, that he was suspected of leaking information and that authorities were searching for him. His brother was arrested and his mother beaten.

[9] In March 2010 the Applicant's wife filed an application to sponsor the Applicant as a permanent resident in the family class.

[10] The record of the decision making process is convoluted and less than clear. However, it is clear that the Applicant raised the issue of duress in defence to the allegation of s 34(1) behaviour.

[11] The Officer concludes that the Applicant was not "brainwashed" or had "diminished *mens rea*". The Officer held that on the matter of torture, the Applicant was happy that he was not asked to torture the men and was otherwise intent on finishing his service. The obligations of military service and its length of service is not disclosed.

[12] The Officer rejected the claim that the Applicant's service was involuntary and that the Applicant was not under duress to be a member of SPI, or to be involved in spying. The Officer noted that the Applicant did not flee when he witnessed torture.

[13] There are two issues in this judicial review.

- the reasonableness of the conclusion that the SPI (a part of the Islamic Revolutionary Guard Corps) was an organization described in s 34(1)*(f)* of *IRPA*; and
- the reasonableness of the finding that the Applicant was not under duress.

III. ANALYSIS

A. *Standard of Review*

[14] On the authority of such decisions as *Miguel v Canada (Minister of Citizenship and Immigration)*, 2012 FC 802, 414 FTR 260 and *Thiyagarajah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 339, 199 ACWS (3d) 1254, the standard of review for both issues is reasonableness.

B. *Re: Organization*

[15] The Applicant did not withdraw his position that his unit of the SPI was not an organization described in *IRPA* s 34(1)*(f)*. However, the Applicant did not press the point in oral argument.

[16] Given the Applicant's own admission that his unit was engaged in targeting dissidents, engaged in torture, and engaged in assassinations of such persons, it is difficult to see how the unit was anything other but one covered by s 34(1)*(f)*.

[17] In any event, the issue is not whether the Court would have come to that conclusion but rather whether such a conclusion was reasonable on the record. It was. Further, it was reasonable to conclude that "there were reasonable grounds to believe" that the Applicant was a member of that organization.

C. *Duress*

[18] There are many troubling aspects of the analysis and rejection of the duress defence. Despite strong evidence that the Applicant was drafted and assigned to the SPI unit, there was pervasive insistence that all the Applicant's actions were voluntary.

There was also a failure to grasp the real reasons the Applicant did not flee after witnessing the first instance of torture.

[19] Both parties relied on *R v Ryan*, 2013 SCC 3, 353 DLR (4th) 387 [*Ryan*], as it is the most recent and authoritative pronouncement on the defence of duress. In fairness to the Officer, the Applicant's decision predates *Ryan* and its principles may have affected the Officer's considerations.

[20] While *Ryan* arises in the context of criminal law as a defence to committing a criminal act, the principles, with modification to the circumstances, are apt in the s 34(1) context. In *Ryan*, the Supreme Court of Canada sets out the elements of the common law of duress, at paragraph 55:

> - an explicit or implicit threat of death or bodily harm proffered against the accused or a third person. The threat may be of future harm. Although, traditionally, the degree of bodily harm was characterized as "grievous", the issue of severity is better

> dealt with at the proportionality stage, which acts as the threshold for the appropriate degree of bodily harm;
>
> - the accused reasonably believed that the threat would be carried out;
>
> - the non-existence of a safe avenue of escape, evaluated on a modified objective standard;
>
> - a close temporal connection between the threat and the harm threatened;
>
> - proportionality between the harm threatened and the harm inflicted by the accused. This is also evaluated on a modified objective standard;
>
> - the accused is not a party to a conspiracy or association whereby the accused is subject to compulsion and actually knew that threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy or association.

[21] In the Officer's analysis there is scant or even any real consideration of what options were open to the Applicant, when he should have realized that he had to do something and what realistically could he do. In the *Ryan* context, this notion of viable options is described as "Safe Avenue of Escape".

[22] In *Ryan* the principle of "No Safe Avenue of Escape" is assessed on a "modified objective basis" as set forth at paragraph 65:

> 65 This element of the common law defence was specifically addressed in *Ruzic* [*R v Ruzic*, 2001 SCC 24, [2001] 1 SCR 687], at para. 61. Once again, the test, evaluated on a modified objective basis, is that of a reasonable person similarly situated:
>
> > The courts will take into consideration the particular circumstances where the accused found himself and his ability to perceive a reasonable alternative to committing a

> crime, with an awareness of his background and essential characteristics. The process involves a pragmatic assessment of the position of the accused, tempered by the need to avoid negating criminal liability on the basis of a purely subjective and unverifiable excuse.
>
> In other words, a reasonable person in the same situation as the accused and with the same personal characteristics and experience would conclude that there was no safe avenue of escape or legal alternative to committing the offence. If a reasonable person similarly situated would think that there was a safe avenue of escape, the requirement is not met and the acts of the accused cannot be excused using the defence of duress because they cannot be considered as morally involuntary.

[23] Short of desertion, insubordination and escape (potentially illegal acts in themselves), which the Applicant did, there was no consideration of these or any other options available to the Applicant. The Applicant is entitled to a full consideration of his defence of duress.

IV. CONCLUSION

[24] For these reasons the judicial review will be granted, the decision will be quashed, and the matter remitted to a different official for a new determination.

[25] There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the decision is quashed, and the matter is to be remitted to a different official for a new determination.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7323-12
STYLE OF CAUSE:	ALEX GHAFFARI A.K.A. "AKBAR GHAFFARI" and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	June 4, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	PHELAN J.
DATED:	June 18, 2013

APPEARANCES:

Ram Sankaran	FOR THE APPLICANT
Rick Garvin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

STEWART SHARMA HARSANYI Barristers & Solicitors Calgary, Alberta	FOR THE APPLICANT
MR. WILLIAM F. PENTNEY Deputy Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT